

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 7

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### REMARKS

The following remarks are respectfully submitted in response to the Office Action mailed July 19, 2006. Claims 1-26 are pending in this application. Claims 1, 13 and 14 have been amended. Claim 1 has been amended to add "the steps of" after the word "comprising." Claim 13 has been amended to state that the cherries are infused for about 6 to about 15 hours. Applicants respectfully submit that support for this amendment can be found in the specification at paragraphs [0016] and [0018]. Claim 14 has been amended to state that the process for making a value-added fruit consists of the steps of providing brined cherries, freezing the cherries, rinsing the cherries, infusing the cherries, and drying the cherries. Applicants respectfully submit that support for this amendment can be found at least in the specification in at least paragraphs [0006], [0009], [0013] and [0014] and in originally filed claim 1. Applicants do not believe any new matter is added. Reconsideration of the application is requested.

In the Office Action, the Examiner has rejected all of the pending claims, claims 1-26, under 35 U.S.C. §103(a) as unpatentable over U.S. Statutory Invention Registration No. H1014 to Kraut et al. in view of Japanese Patent No. JP 60078536 to Hiroto, U.S. Patent No. 4,350,711 to Kahn et al., U.S. Patent No. US 6,479,092 B1 to Wettlaufer, U.S. Patent No. US 6,254,919 B1 to Phillips, and U.S. Patent No. US 5,277,922 to Rejimbai et al.<sup>1</sup>

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<sup>1</sup> Applicants understand the current rejection(s) as the following:

- Claim 1 is rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hiroto and Rejimbai et al. (*see* Office Action, par. 3);
- claims 4-7, 12-14, 20, 24 and 26 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. alone (*see* Office Action, pars. 5, 6, 8, 13, 16 and 17);
- claims 17, 18, 21-23 and 25 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hiroto, Kahn et al. and Phillips (*see* Office Action, pars. 11, 14 and 15);
- claims 2, 3, 8, 9, 15 and 16 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Kahn et al. (*see* Office Action, pars. 4, 7 and 10);
- claims 10 and 11 are rejected under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Wettlaufer (*see* Office Action, par. 10); and
- claim 19 is rejected under 35 U.S.C. §103(a) as unpatentable over

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 8

The following paragraphs summarize the Applicants understanding of the substance of the current rejections. The Examiner has rejected claims 1<sup>2</sup>, 6, 7 and 12 under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hirotoimo and U.S. Patent No. US 5,277,922 to Rejimbai et al. In the Examiner's opinion, Kraut et al. disclose a method of making cherries which includes the steps of providing brine cherries, for example, whole cherry fruit and fruit pieces; bleaching the cherries to lower the level of residual sulfur dioxide to 100 parts per million (ppm) or less; adding flavor and sugar; drying the cherries in order to maintain only a minimum of free syrup.

The Examiner admits that Kraut et al. fail to disclose freezing the cherries in water. However, in the Examiner's opinion, this element of the claimed invention is disclosed in Hirotoimo. More specifically, in the Examiner's opinion, Hirotoimo teaches a fruit, such as a cherry, having a high sugar content. The fruit is washed with water, drained, and then quickly frozen to prevent fruit pulp damage. The Examiner asserts that it would have been obvious to modify Kraut et al. with the teaching of Hirotoimo because freezing the cherries would prevent pulp damage.

In the Examiner's opinion, the element of freezing the cherries in water is also disclosed in Rejimbai et al. More specifically, in the Examiner's opinion, Rejimbai et al. teach a method of preserving fruits by placing the fruit in a liquid having a higher freezing point than the fruit.

The Examiner has rejected claims 2-5, 8, 9 and 15 under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hirotoimo, Rejimbai et al. and U.S. Patent No. 4,350,711 to Kahn et al. The Examiner admits that Kraut et al. do not disclose the

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Kraut et al. in view of Phillips (*see* Office Action, par. 12).

In responding to this Office Action, Applicants address the rejections of dependent claims as including the specific individual references discussed by the Examiner used in combination with the cited references of any previous claim to render the dependent claim obvious. For example, in the case of the rejection of claim 24 at paragraph 16 of the Office Action, Applicants have assumed the rejection under §103(a) is based on Kraut et al., Kahn et al., and Phillips.

<sup>2</sup> The Examiner states that using cherry juice or any other type of flavor in the infusions bath does not involve an inventive step because the flavor depends on consumer preference. An "inventive step" is an international standard and not the appropriate test to be applied to this claim. Applicants respectfully submit that the appropriate test in the United States is whether the claimed subject matter would have been obvious to one of ordinary skill in the art at the time the application was filed.

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 9

temperature of the cherry juice in the infusion bath, infusing the brined cherries with red cabbage or red tart cherry juice, or the moisture content of the dried cherries. However, the Examiner states that Kahn et al. teach a method of infusing fruits, such as cherries, with sugar solids in infusion baths at a temperature of about 45° F to about 120° F and drying the infused fruits to a moisture content of about 15-28% to improve microbiological stability. In the Examiner's opinion, it would have been obvious to modify Kraut et al. with the teachings of Kahn et al. by having cherries with reduced moisture content in order to improve microbiological stability.

The Examiner has rejected claims 10, 11, 13, 14 and 16 under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hirotomo, Rejimbai et al., Kahn et al. and U.S. Patent No. 6,479,092 B1 to Wettlaufer. The Examiner admits that Kraut et al. fail to disclose the water activity of the dried cherries. In the Examiner's opinion, Wettlaufer teaches a method for infusing fruit such as cherries, where a water activity range of 0.4-0.64 is desirable for good storage life of the product. Thus, the Examiner concludes that it would have been obvious to modify Kraut et al. with the teachings of Wettlaufer by producing cherries having a water activity in this range to obtain good storage life.

The Examiner has rejected claims 17-20<sup>3</sup> and 22 under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Hirotomo, Rejimbai et al., Kahn et al. and U.S. Patent No. 6,254,919 B1 to Phillips. The Examiner admits that Kraut et al. also fail to disclose infusing in a two step process. The Examiner states that the infusion process of Kahn et al. may be limited to the use of two infusion baths, so long as the about 32-55% water soluble solids content is reached in the fruit. The Examiner admits that Kahn et al. fail to disclose the time required to perform the infusion process. However, the Examiner asserts that it would have been obvious to one of ordinary skill in the art to use a high Brix infusion bath to reduce the time required for the infusion process.

The Examiner also admits that Kraut et al. fail to disclose a pasteurizing step or pasteurizing temperature. In the Examiner's opinion, Phillips teaches a method of preparing

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<sup>3</sup> In paragraph 11 of the Office Action, the Examiner states that using red cabbage juice would not involve an inventive step. Applicants respectfully submit that application of the "inventive step" standard to claims 17 and 18 is not appropriate here.

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 10

shelf-stable fruit, such as cherries, by immersing fruit in a bath of sugar syrup and then drying with hot air at a temperature effective for pasteurization. The Examiner states that Phillips discloses pasteurizing at an effective temperature of about 176° F to about 203° F. The Examiner asserts that it would have been obvious to modify Kraut et al. with the disclosure of Phillips to use a pasteurizing step at a temperature within 176° F to 203° F to impart stability of the product.

The Examiner has rejected claims 23<sup>4</sup>-26 under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Kahn et al. and Phillips as discussed above.

In Response to the above rejections, Applicants respectfully submit that under current United States law, to establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. MPEP 2143; *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Regarding the rejections of claims 1-20, 22, and 25, Applicants respectfully submit that the Examiner has failed to establish a *prima facie* case of obviousness. The cited references as combined fail to teach or suggest all of the claim limitations is one reason the Examiner has failed to establish a *prima facie* case of obviousness. As admitted by the Examiner, Kraut et al. do not teach or suggest freezing the cherries in water. (Office Action mailed July 19, 2006 at p. 2). Applicants have not been able to locate disclosures of this element of the claims in any of the other cited references. As Applicants understand the present rejection, in the Examiner's opinion, this deficiency is supplemented by Hiroto and Rejimbai et al. As discussed in Applicant's April 11, 2006, response, Hiroto does not disclose freezing in water. To the contrary, Hiroto discloses a process for preparing individually quick frozen

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<sup>4</sup> In paragraph 15 of the Office Action, the Examiner also applies the "inventive step" standard to claim 23 as it relates to the use of red cabbage juice as a colorant.

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 11

(IQF) raw fruit which prevents the fruit from pulp damage. (Sinha Decl., ¶ 6). The fruit is raw, not brined, and is washed with water and then frozen, but the fruit is not frozen in water as presently claimed. Hirotomo simply does not suggest freezing the cherries in water, as it specifically teaches to rinse the fruit and then freeze the fruit.

Claims 1-20, 22, and 25 all require freezing the cherries in water. As discussed in Applicants' specification, freezing the cherries in water softens the firm tissue of the brined cherries, facilitates removal of sulfur and coloring, and aids infusion of the cherries to a higher Brix level. (Specification, par. 0009). The Examiner asserts that it would have been obvious to modify Kraut et al. with the teaching of Hirotomo because freezing the cherries would prevent pulp damage. Even assuming this is true, as discussed in the specification at paragraph [0009], in the claimed process, freezing the cherries in water softens the firm tissue of the brined cherries and facilitates removal of sulfur during rinsing. Thus, freezing the cherries in water would not prevent pulp damage to the cherries. (Sinha Decl., ¶ 7). Accordingly, one of ordinary skill in the art would not have been motivated to modify Kraut et al. with Hirotomo because the process of Hirotomo would not soften the firm tissue of the brined cherries.

Also, in the Examiner's opinion, freezing fruits in water is well known in the art as evidenced in Rejimbai et al. Rejimbai et al. disclose a method for preserving fruits characterized by juice sacs and rag, such as oranges. (Sinha Decl., ¶ 8). Applicants have been unable to locate any suggestion in Rejimbai et al. that cherries are to be frozen in water. Moreover, in Rejimbai et al., the citrus fruit is frozen to preserve and not to soften the firm tissue of the citrus fruit. (Sinha Decl., ¶ 8). In particular, Rejimbai et al. at column 1, lines 55-60 state:

It is an object of the present invention to provide a method for storing and preserving fruits that are characterized by having juice sacs and rag for extended time periods whereby the food quality flavor of the internal juices are maintained and the external appearance does not deteriorate.

Rejimbai et al. disclose other fruit-preserving methods (i.e., olives and tree buds), but indicate that fruit characterized by juice sacs and rag are different from these fruits. (Col. 1, lines 35-54). Unlike citrus fruits, brined cherries do not have juice sacs and rag (Sinha Decl., ¶ 9).

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 12

Nothing in Rejimbai et al. teaches or suggests that the disclosed method can be used with all fruit, or any fruit other than those characterized by juice sacs and rag. Quite to the contrary, as discussed above, Rejimbai et al. teach away from such use as they indicate that fruit characterized by juice sacs and rag are different from other fruits. As such, Applicants respectfully submit that Rejimbai et al. instruct that their process is uniquely useful for use in connection with citrus fruit. Thus, one of ordinary skill in the art would not have been motivated to modify Kraut et al. with Rejimbai et al. because cherries do not have juice sacs and rag. (Sinha Decl., ¶ 8).

The Examiner admits that Kraut et al. do not disclose freezing the cherries in water. Hirotomo discloses freezing fruit to prepare an IQF raw fruit, but does not disclose freezing the fruit in water. As Applicants understand the rejection, the Examiner is relying on Rejimbai et al. which discloses freezing citrus fruits to preserve the fruit, to supplement the deficiency in Hirotomo. As discussed above, none of the cited references, either alone or in combination teach or suggest freezing cherries in water, or freezing cherries to soften the firm tissue of the fruit. Accordingly, for at least these reasons, Applicants respectfully submit that claims 1-20, 22, and 25 are in condition for allowance.

The Examiner has rejected claims 23-26 under 35 U.S.C. §103(a) as unpatentable over Kraut et al. in view of Kahn et al. and Phillips. None of the cited references, alone or in combination, teach or suggest a method for converting brined cherries to black sweet cherry products. Additionally, the Examiner admits that "Kraut et al is silent as to adding lemon juice, however, it would be obvious to one of ordinary skill in the art to modify Kraut et al with the teachings of Phillips and Kahn et al by utilizing any flavoring agent such as lemon juice or natural black sweet cherry flavor as recited by applicant." The Examiner also states:

One of ordinary skill in the art would expect that lemon juice is [sic] inherently functions as a lemon flavorant and therefore it would not involve an inventive step utilizing any flavoring agent such as lemon juice or natural black sweet cherry flavor as recited by applicant. Besides it is unclear how lemon juice is different from a lemon flavorant because they both contain lemon. (Office Action, par. 19).

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 13

A primary difference between lemon juice and a lemon flavorant is the acidity. (Sinha Decl., ¶ 10). Lemon juice concentrate has a higher acidity than a lemon flavorant. (Sinha Decl., ¶ 10). As stated in Applicants' April 11, 2006 Response, the addition of lemon juice, as opposed to merely a lemon flavorant, changes the Brix to acidity ratio of the infused cherries such that the infused cherries more closely mimic the natural taste of black sweet cherries. (Sinha Decl., ¶ 11). In the claimed process, lemon juice is added to increase the acidity and not to import lemon flavor. (Sinha Decl., ¶ 12). Applicants respectfully submit that it is only through hindsight that one of ordinary skill would have been led to add about 1% lemon juice to the stabilization syrup, which is added to a first bath to form a second bath. Lemon juice and lemon flavorant are two different ingredients, each having a specific function. (Sinha Decl., ¶ 11). Accordingly, one of ordinary skill in the art would not have been motivated to modify Kraut et al. with the teachings of Phillips and Kahn et al. by adding any flavoring agent such as lemon juice because a lemon flavor is not desired, instead a black sweet cherry flavor is desired. Thus, for at least this reason, claims 23-26 are patentable over the cited references.

Regarding the rejection of claims 12-14, the Examiner asserts that Kraut et al. disclose that the entire process was accomplished in less than five days and references claims 4 and 5 of Kraut et al. (Office Action, pars. 8 and 20). Also, referring to claim 12 specifically, the Examiner states that "it would be obvious to one of ordinary skill in the art that this two-step method takes less than about one week as instantly claimed." (Office Action, par. 20). Applicants respectfully point out that in its April 11, 2006 response, Applicants amended claim 12 to state that the cherries are infused for from about 6 to about 15 hours. However, this element was not addressed in the Office Action. In the present response, claim 13 has similarly been amended to state that the cherries are infused for from about 6 to about 15 hours.

Kraut et al. state that the cherries should be infused to a Brix of "about 40° Brix (e.g., from about 35° Brix to about 45° Brix) for maraschino cherries and about 70° Brix . . . for glacé cherries." (Col. 4, line 66-col. 5, line 2). Applicants note that in Tables 1, 2 and 3, Kraut et al. disclose that cherries were infused for 25 hours, 73.5 hours and 73.5 hours to

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 14

attain a fruit Brix of 39.5 Brix, 34.7 Brix, and 35.5 Brix, respectively. Table 1 shows a maraschino cherry having a Brix of 37.8 at 1375 minutes (22.92 hours - about 23 hours). Applicants have not been able to locate disclosure of the element "the rinsed cherries are infused for from about 6 hours to about 15 hours" in the Kraut et al. reference. Accordingly, because none of the cited references teach or suggest this element, Applicants respectfully submit that claim 12 and amended claim 13 containing this limitation are allowable over the cited references for this additional reason.

If the Examiner maintains the rejection of these dependent claims, Applicants note that 37 C.F.R. §1.104(c)(2) states that "When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained in each rejected claim specified." As such, to enable Applicants to better understand the pertinence of the reference(s) to these dependent claims, Applicants respectfully request that the Examiner indicate where the Examiner believes the element "the rinsed cherries are infused for from about 6 hours to about 15 hours" is disclosed in the cited reference(s) should the rejection be maintained.

Claim 14 has been amended to state that the claimed process "consists of" the steps of providing brined cherries, freezing the cherries, rinsing the cherries, infusing the cherries, and drying the cherries. None of the cited references, either alone or in combination, teach or suggest the process claimed in dependent claim 14. Thus, claim 14 as amended is allowable over the cited references.

Claims 21 and 22 require soaking the cherries for about 2 hours in a first infusion juice comprising a Brix of about 68 and then soaking the cherries for about 4 hours in a second infusion juice comprising a Brix of about 68. Claims 21 and 22 also require freezing the cherries for about 12 to about 72 hours to soften the firm tissue of the brined cherries. The Examiner asserts that Kraut et al. disclose that the entire process was accomplished in less than five days and references claims 4 and 5 of Kraut et al. The Examiner admits that Kraut et al. do not disclose freezing the cherries and infusing in a two step process. As discussed above, the Examiner relies on Hiroto and Rejimbai et al. to provide the missing element of freezing



Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 15

the cherries. However, as discussed in connection with claims 1-20, 22 and 25, none of the cited references disclose freezing cherries in water or freezing the cherries to soften the firm tissue of the fruit. Accordingly, for at least this reason discussed above, claims 21 and 22 are in condition for allowance.

The Examiner relies on Kahn et al. in asserting that it would have been obvious to infuse in a two step infusion bath process. The Examiner admits that "Kahn et al. is silent as to the period of time this takes. However, it would be expected that the greater the level of Brix in the infusion bath, the lesser the amount of time needed for infusion. It would be obvious to one of ordinary skill in the art to utilize a high Brix infusion bath for the product to reduce time." (Office Action, par. 14). As discussed in Applicants' April 11, 2006 response, this premise is not true. In paragraph 21<sup>5</sup> of the July 19, 2006 Office Action, the Examiner notes Applicants' argument, but then states: "However, Kahn et al. teach as cited in the prior office action, the infusion process maybe [sic] limited to the use of two infusion baths so long as the about 32-55% water-soluble solids content is reached in the fruit." Applicants respectfully submit that this rejection ignores the fact that Kahn et al. do not teach the time required to infuse the cherries in a two-step infusion process.

Infusion is a process by which water is forced out of the fruit and replaced by the soluble solids of the infusion bath (Sinha Decl., ¶ 13). The greater the Brix level of an infusion bath, the greater the amount of soluble solids in the infused fruit (Sinha Decl., ¶ 14) and the higher the final Brix of the infused fruit. (Sinha Decl., ¶ 14). This is not merely a matter of infusing at a faster rate, but rather to a higher soluble solids content, which is not disclosed or suggested by the cited reference. Thus, it would not be obvious to one of ordinary skill in the art to use a high Brix infusion bath merely to achieve a reduced infusion time. Accordingly, Applicants respectfully submit that claims 21 and 22 would not have been obvious over the combination of cited art.

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<sup>5</sup> In this paragraph the Examiner also applies the "inventive step" standard to claims 21 and 22 as it relates to using a two-step infusion process.

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 16

Applicants respectfully contend that the basis for all claims rejected under 35 U.S.C. §103 over Kraut et al. in view of Hirotsuno, Kahn et al., Rejimbai et al., Wettlaufer and Phillips are merely a hindsight reconstruction of Applicants' own invention, using Applicants' invention as a template to piece together prior teachings. The Court of Appeals for the Federal Circuit has ruled that to impart to one of ordinary skill in the art knowledge of the invention, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome, wherein that which only the inventor taught is used against its teacher. *W.L. Gore and Associates, Inc. v. Garlock Inc.* 721 F.2d 1540, 1553 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984).

The Court of Appeals for the Federal Circuit has held that "Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. The mere identification in the prior art of each claim element is insufficient to defeat the patentability of the combined subject matter as a whole. *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998). Under §103, teachings of references can be combined *only* if there is some suggestion or incentive to do so." *In re Fritch* 23 U.S.P.Q.2d 1780, 1783 (Fed. Cir. 1983). The court further stated, "It is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious. *Id.* One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." *Id.* at 1784.

The Examiner states that "so long as [a judgment on obviousness] takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicants' disclosure, . . . reconstruction [based on hindsight reasoning] is proper." However, Applicants maintain that the Examiner's obviousness rejection only includes knowledge gleaned from Applicants' disclosure. In particular, rejections on obviousness cannot be based on mere conclusory statements without specific factual findings and some concrete evidence in the record to support these findings. *In re Lee*, 277 F.3d 1338, 1343-45 (Fed. Cir. 2002); *In re Zurko*, 258 F.3d 1379, 1386 (Fed. Cir. 2001). Applicants respectfully submit that the Examiner has not produced evidence to support

Applicants : Nirmal K. Sinha et al.  
Appln. No. : 10/624,225  
Page : 17

the Examiner's conclusory statements, for example, that it would have been obvious to one of ordinary skill in the art to use a high Brix infusion bath to reduce the time required for the infusion process or that one of ordinary skill in the art would expect that lemon juice inherently functions as a lemon flavorant.

The mere fact that references can be combined or modified does not render the resulting combination obvious unless the prior art also suggests the desirability of the combination. Applicants respectfully submit that the references cited by the Examiner do not suggest the desirability of the combination proffered by the Examiner in this case or provide a reasonable expectation of success based upon the prior art.

For at least the reasons discussed above, Applicants respectfully submit that there is no such suggestion or motivation found in the references. For at least the reasons discussed above, the references of record, taken singly or in any combination, do not teach or suggest the claimed processes as set forth in independent claims 1, 17, 21, 23, and the claims that depend from them. Accordingly, Applicants respectfully submit that all of the presently pending claims are in condition for allowance.

Applicants have made a concerted effort to place this application in condition for allowance. If the Examiner believes there are any additional informalities, the courtesy of a telephone call to Applicants' attorney would be sincerely appreciated. If the Examiner feels that a telephone interview would be helpful, Applicants' attorneys are more than happy to schedule one at the Examiner's convenience. A Notice of Allowance is earnestly solicited.

Respectfully submitted,

10-19-06  
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